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Can the Antarctic Treaty Create *Erga Omnes* Obligations Enforceable Under International Law Applicable to Third Party States?

The ability to enforce treaty obligations on third party States has always been a complex and difficult task legally. The Antarctic Treaty is no different and comes with further complications as there is no sovereign body, with overall control of the region, to champion the process. Further, it is recognised widely that Antarctica plays a fundamental role in the environmental health of the globe, and plays a vital role as a laboratory where scientific research is carried out to address issues that impact the whole world. The following are two of those issues: illegal, unreported and unregulated fishing in the southern oceans and the growing hole in the ozone layer over Antarctica. In the instances above, and others, the issue of enforceability on third party states becomes so much more relevant.

This essay will explore the Antarctic Treaty and only two of many doctrines of international law, with regard to the Antarctic treaty and explore their ability to enforce *erga omnes* obligations.

The Antarctic Treaty

The Antarctic Treaty was signed in 1959 by twelve countries that were all active scientifically, in Antarctica, during the 1957-58 International Geophysical Year. The treaty came into force in 1961 and currently has 48 signatory parties. However, only 28 of the signatory parties have voting power[1]. Currently, there are 144 countries not party to the Antarctic Treaty.

The Antarctic Treaty requires its signatories to use Antarctica for peaceful purposes only. There is a total prohibition on weapons testing and military measures. Nuclear explosions and the disposal of radioactive waste material are prohibited in Antarctica [2]. The treaty parties have an obligation to act in good faith and not frustrate the treaty's object and purpose or commit any flagrant breaches[3].

[1] http://www.ats.aq/e/ats_treaty.htm

[2] http://www.nti.org/e_research/official_docs/inventory/pdfs/antarc.pdf

[3]http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

It is argued that despite the lack of sovereignty over Antarctica, the Antarctic Treaty cannot be considered invalid or ultra vires by the international community and it is simply not realistic for any third party nations to do so[4].

There have been attempts to discredit the legal validity of the Antarctic Treaty through academic means; in the context of statements that Antarctica is part of a global commons, or is the common heritage of mankind. However, these doctrines have been considered more politically than legally relevant[5]. In addition, there is an argument that only a quarter of the world's states are party to the treaty so its validity is questionable, but this does not constitute a basis for questioning the legality of the Antarctic Treaty[6].

In recent years it has been third world nations questioning the Antarctic Treaty. Malaysia has been at the forefront, and with its allies has objected to the Treaty and taken a stance against the legitimacy of the Treaty in the international setting. One argument raised was that at the time of the original signing, much of the third world was under colonial rule. This raises questions over if those colonies took a stance in support of their own interests or of their colonial masters. In the case of Britain for instance, which has a long standing interest in the region, many difficult questions have been raised. Further the presence of apartheid ruled South Africa, in the Antarctic Treaty, was considered to be morally offensive by many contributing nations. The Antarctic Treaty has endured however, by engaging with those actors in institutional settings such as the United Nations General Assembly and by being sufficiently flexible. The result has been that the demands of the international community have been largely addressed[7] though there does remain work to be done.

While not universally ratified, there is significant participation by third party States through accession. This is open to all third party States who wish to accede to the treaties core values. State practice also makes it clear that treaties concluded between limited groups of States are legally recognised in international law and can have legal consequences for non participating States. Therefore, if the Antarctic Treaty is a legitimate and valid treaty, it follows that third party States cannot ignore it or treat it as nonexistent.[8] Since Antarctica is beyond the territorial sovereignty of any State, no injured State can seek remedies for any breach of the treaties articles. The only theory that may be invoked, in this situation, is the doctrine of *erga omnes*[9].

[4] Watts, A, 1992. *International Law and the Antarctic Treaty System*

[5] Ibid at 4

[6] Shaw,M, 1991, International Law, Grotius, Cambridge

[7] Dodds, Klaus, 2010, *Governing Antarctic: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty*, Global Policy, Vol 1, Issue 1, pages 108-115, Januray 2010

[8] *Ibid* at 4

[9] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni &Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands.

Obligations Erga Omnes?

In International Law "*obligation erga omnes*" is a legal term describing certain legal duties that are owed to all States by all States. The concept was recognised in the *Barcelona Traction* case[10] of 1972, in which the International Court of Justice identified in *obiter dictum*, a category of international obligations called *erga omnes*[11]. These obligations intended to protect and promote the basic values and common interests of all. The scope of the doctrine has been developed over time[12].

The Antarctic Treaty's Applicability to Non State Parties for Obligations Erga Omnes

In discussing the possibility of a special body of laws for Antarctica, which can create obligations *erga omnes* from the Antarctic Treaty the following two theories will be discussed; Law of Treaties Approach and Special Laws for Antarctica.

Law of Treaties Approach.

The Law of Treaties Approach seeks to establish objective regimes as an exception to the *res inter alios acta* and the *pacta tertiis* rules. It is has been recognised that some kinds of treaties are established for the object they regulate, a regime which concerns and can potentially bind third party States. States that have a particular interest in a subject can join together to establish a special regional international law. This has been done in the case of management of international rivers and of special territories. Charney points out that in the *Asylum* case the International Court of Justice acknowledged that States in a region could establish special rules of behaviour[13]. It can also be explained that some treaties produce effects beyond the community of signatories because these States assume the role of a de facto international legislator[14]. Antarctica has often been described and recognised as a region controlled by

[10] Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) (1962–1970) (24 July 1964)

[11] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni & Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands.

[12] Tams, Christian J. and Tzanakopoulos, Antonios, Barcelona Traction at 40: The ICJ as an Agent of Legal Development (June 17, 2010). Leiden Journal of International Law, Vol. 23, pp. 781-800, 2010.

[13] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni & Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands. Page 62

[14] Dupuy & Vignes , 1991, *A handbook on the new law of the sea*, Brill Academic Publishers, The Netherlands, page 1272

such a treaty. It is strongly argued that this is not possible and can only work where there has been consent to be bound, however the contra position is that under certain conditions such objective regimes can be established. There has been recognition of cases where some States establish norms applicable in some way to others but this is limited, and typically the legislating State(s) actually have Sovereignty over the territory in question[15].

The Vienna Convention provides that third party States can be bound by international agreements if there exists *an intention* by the party States to bind such non-party States and that those third States have consented to be bound. This is the essence of accession in international law. However, it is of interest that in the Antarctic Treaty itself only United Nations member States can accede to the Antarctic Treaty or where a non-United Nations member State is concerned, it must be invited to accede to the treaty. This limits participation[16].

Authors such as Klein argue that, in relation to the Antarctic Treaty, legal capacity may be conferred by a signatory State upon itself based on explicit treaty provisions such as Article X [17]. This can be taken from a general interest that a State may have in a region, or from the participation by the treaty States themselves who have territorial competence and specialist knowledge in relation to the subject matter. He also states that Article X amounted to an assertion of competence, which was accepted by States which early on raised no objection[18].

According to Gerald legitimacy of *erga omnes* effects on a territorial regime depends upon the participation of all States interested in the establishment or entitled to participate in it. The "Antarctic Club" would argue that anyone can participate in it. However participation requires a huge investment of money, as voting rights are only conferred if you are actively participating in Science in Antarctica. This is expenditure that some States simply can not afford to reasonably commit to[19].

Fitzmaurice believes that the Antarctic Treaty is an example of "participation in use, of a marine and land territory in which a treaty established an international regime". He claims that the treaty establishes in a permanent manner, a joint system for use of a territory by both parties to the treaty as well as third party States. The manner of the use of the territory does

[15] Dupuy & Vignes , 1991, *A handbook on the new law of the sea*, Brill Academic Publishers, The Netherlands, page 1272

[16] Fayette, L, *Responding to Environmental Damage in Antarctica*, in Riddell , R,& Triggs, G, 2007,*Antarctica: Legal and Environmental Challenges for the Future*, The British Institute of International and Comparative Law, UK & Article XIII of the Antarctic Treaty.

[17] Article X. Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to that end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

[18] Fitzmaurice, M, 2002, *Third Parties and the Law of Treaties*, Yearbook of the United Nations Law, Volume 6, 37-137, Netherlands.

[19] Simma, B, 1986, *Antarctic Treaty as a Treaty Providing for an Objective Regime*, 19 Cornell Int'l L.J. 189

not breach any rights accorded to third party States on the basis of general international law and the parties to the treaty consist of all the interested States in the establishment of the regime together with the States that have territorial claims[20].

Despite this there are many arguments that can not be reconciled and deny the Antarctic Treaty has the necessary characteristics of an objective regime effective *erga omnes*[21].

Bruno Simma, now a presiding Judge in the International Court of Justice, discusses this topic in his journal article "The Antarctic Treaty as a Treaty providing for an Objective Regime" and highlights that that *erga omnes* obligations could result by application of the following principle from the Vienna Convention Law of Treaties principle.

> Article 36
>
> Treaties providing for rights for third States
>
> 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
>
> 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

As a result, under Article 36, a treaty may create rights for third States if the original parties so intend and the third party State assents. This assent is presumed as long as the contrary is not indicated. This article was codified by the International Law Commission after much legal debate, so carries significant legal weight as a well considered and robust legal position[22].

In addition, *erga omnes* obligations may arise by conferring the status of International Customary Law upon a treaty under the process recognised in Article 38 of the Vienna Convention Law of Treaties[23].

Therefore, rules in a treaty can become binding on third party States through international custom. Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third party State as a customary rule of international law being recognized as

[20] Ibid at 8

[21] Pers com Alan Hemmings

[22] Fitzmaurice, M, 2002, *Third Parties and the Law of Treaties*, Yearbook of the United Nations Law, Volume 6, 37-137, Netherlands. Website: http://www.mpil.de/shared/data/pdf/pdfmpunyb/fitzmaurice_6.pdf

[23] Ibid at 19

such. Unlike treaty law, which must be followed only by States that are parties to the agreement in question, international customary law is binding upon all states, no matter whether they have ratified a treaty, which contain the rule in question, or not. When states act consistently in their international and internal relations during a long period of time, these actions/practises become accepted by the international community as applicable law[24].

When viewing the Antarctic treaty through the lens of Articles 35 to 38 of the Vienna Convention Law of Treaties, in trying to fit it into an objective regime, we can make the following observations. Prima facie it appears that some of the Treaty obligations are phrased in objective terms, which could create the intention to establish obligations on third party States. This is set out in the Vienna Convention Law of Treaties treaty articles I[25], IV[26] paragraph 2, and article V[27]. Simma explains that it was assumed that such a reading would not render the Antarctic Treaty Article X useless, as it could have an interpretation that could be construed as only *inter parties*.

The Madrid Protocol is a strongly worded document discussing environmental protection and uses objective wording. The Madrid Protocol bans all mining in Antarctica and states that Antarctica is a natural wilderness which is to be used for peaceful purposes and scientific research only. It was added to the Antarctic Treaty by member States in 1992 and due to its clear and objective wording, it adds clarity to the Treaty in this area.

However, even if the Treaty is drafted with the intent of binding a third party State, the third party State will not have accepted the articles expressly. There is acknowledgement within the treaty of a wider community of non-member States, but there is no evidence to make those interests into enforceable rights[28].

The difficulty in finding the Antarctic Treaty as an objective regime valid *erga omnes* is therefore harder, as there has not been, in reality, consent from the non treaty parties. Since 1983, debates at the United Nations have been strongly critical of the role of the Antarctic Treaty States in relation to Antarctica, and in light of these views any current acceptance of the treaty system as an objective regime may be difficult to establish. Charney highlights that he knows of no third party State that had expressly communicated to the Antarctic Treaty States that it intended to bind itself directly to any treaty obligations. However, he also points

[24] Simma, B, 1986, *Antarctic Treaty as a Treaty Providing for an Objective Regime*, 19 Cornell Int'l L.J. 189

[25] Article 1 – The area to be used for peaceful purposes only; military activity, such as weapons testing, is prohibited but military personnel and equipment may be used for scientific research or any other peaceful purpose

[26] Article 4 – The treaty does not recognize, dispute, nor establish territorial sovereignty claims; no new claims shall be asserted while the treaty is in force

[27] Article 5 – The treaty prohibits nuclear explosions or disposal of radioactive wastes , & Simma, B, 1986, *Antarctic Treaty as a Treaty Providing for an Objective Regime*, 19 Cornell Int'l L.J. 189

[28] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni & Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands.

out that under customary law a less formal indication of acceptance may be enough in some circumstances. Consequently, comments, either oral or written, made at United Nations meetings, in support of the Antarctic Treaty, could potentially have the ability to be held as enough to prove accession to the Antarctic Treaty by non-member States. However, the question does arise whether before the 1980's, when the treaty had been in operation for some 20 years, the objective quality of the regime had become established with the acquiescence of the wider international community.

In summary, under the Vienna Convention Law of Treaties, it does not appear possible that the Antarctic Treaty can produce valid *erga omnes* effects, as the silence of third parties can not be interpreted as assent.

Although the Antarctic Treaty viewed as a whole is unlikely to be considered to have the necessary characteristics for an objective regime, certain parts of the Antarctic Treaty in isolation might achieve that standard. The following types of treaties have been held to be valid objective regimes and thus attract obligations *erga omnes*.

> Boundary Treaties - because of their sensitivity in international relations, have always been considered a classic example of objective regimes[29].
>
> Treaties on International Waterways and Rivers - the regimes established under these are regarded as conferring rights on third states[30]. In the Wimbledon case, the Court explained that "an international waterway...for the benefit of all nations of the world" had been established"[31]

In State practice, frequent reference is made to treaties providing for demilitarization and neutralisation as producing effects *erga omnes*. State practice treaties acquire objective character due to their importance in the global community[32]. In light of this, it could be argued that the environmental and demilitarisation articles of the Antarctic Treaty could arguably be considered to have an objective character. Antarctica, its surrounding ice shelves and oceans play a vital role in the state of the global environment and it serves as an important venue for scientific research that may shed light on global environmental issues. This was highlighted when the expanding ozone hole over Antarctica was found, and the more recent problem of Illegal Unregulated, Unreported (IUU) fishing in the Antarctic territory and its effect on the world as a whole[33]. The Madrid protocol came into existence

[29] Ragazzi, M , 1997, *Zones of Peace as objective regime*s, in, The concept of International obligations erga omnes, Oxford University Press, UK, page 180

[30] Ibid at 28

[31] Shaw,M, 1991, *International Law*, Grotius, Cambridge, p581

[32] Ragazzi, M , 1997, *Zones of Peace as objective regime*s, in, The concept of International obligations erga omnes, Oxford University Press, UK, page 185

[33] Dodds, Klaus, 2010, *Governing Antarctic: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty*, Global Policy, Vol 1, Issue 1, pages 108-115, January 2010

due to these very issues. Antarctica plays a central role in the biodiversity, climate, and ozone regimes, among other things and may indeed create expectations of general compliance. In short such a treaty may come to be seen as reflecting legal standards of general applicability and as such must be deemed capable of creating rights and obligations both for third party States and third party organizations[34].

Certain environmental harm is identified as possibly widening the scope of *erga omnes* obligations that may be pursued by any party. Dinah Shelton explores the issue of common concern for humanity through the lens of the environment. Certain environmental harm has been identified as concerning to all which can impose a duty to co-operate. A duty that itself has shown to be enforceable. This could have the potential to be argued against third party states if a breach in environmental issues were to happen.

However, there seems today, notwithstanding past arguments in its favour, very little legal support for the idea of the Antarctic Treaty providing an objective regime applicable *erga omnes*.[35]

Special Laws for Antarctica

When looking into the development of laws which govern Antarctica it is important to understand that the normal means of enacting law does not apply as there is no single sovereign body. Because of this, any special laws for Antarctica would need to be based upon the development of international law and governed by the processes which create those laws[36].

The current situation is that the Antarctic Treaty has various norms which are accepted by treaty members which are accepted as law. Over time, these normative statements have been accepted by not only the member States, but also by third party nations who have indicated that they accept many of the norms established by the Antarctic Treaty as law[37]. As a consequence, a number of international norms taken from the Antarctic Treaty have become assimilated into the rules of general international law binding on all States[38].

[34] Perez-Leiva, M, 2011, *International Law And The Right To A Healthy Environment As A Jus Cogens Human Right* http://ezinearticles.com/?International-Law-And-The-Right-To-A-Healthy-Environment-As-A-Jus-Cogens-Human-Right&id=1933199 accesses 28th Jan 2011

[35] Alan Hemmings pers com

[36] Shaw, M, 1991, International Law, Grotius, Cambridge

[37] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni & Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands.

[38] Ibid at 24

The parties to the Antarctic Treaty have maintained unity in their efforts to promote the norms of the Antarctic Treaty. When there has been any sign that third States plan to undertake activities in the Antarctic that work against the norms established by the Antarctic Treaty. The Treaty Parties have reacted in a united manner to stop the actions of the third party States and successfully stopped what they were trying to do. It is usual when third party States have an interest in undertaking activities in Antarctica they have, of their own accord placed themselves under the norms of the Antarctic Treaty. This has been done by either joining the Treaty or by acting in conjunction with a Treaty party[39]. However the subject matter of the Antarctic has become more complex to govern, as more and more people are involved in the continent, in many different ways, including those involved in; Illegal Unregulated and Unreported Fishing, Law of the Sea and Coastal State Antarctic, Tourism and Whaling. The capacity to manage and regulate will continue to be challenged by third party States, especially if the issue mineral exploitation arises.[40]

The Antarctic Treaty still remains the foundation of Antarctic governance and needs to retain legitimacy beyond membership but to the International community as a whole as, Antarctica's legal future is subject to the will of the international community. Any further developments will proceed upon the significant foundation of international law that cannot be easily displaced. It is highly likely that these norms: such as its nuclear free status will be kept in mind as members of the international community proceed to develop new Antarctic law.

Although there are many theoretical arguments on whether the Antarctic Treaty parties can enforce obligation *erga omnes* on third party States. This is legal theory/ jurisprudence. And academia at its best, many different arguments from many different perspectives. The reality of the political environment is that essentially the Antarctic Treaty has worked as it has been adhered to by the international community at large.

However, it must be acknowledged that there is growing interest in Antarctica, and it will be interesting to see the developments in Antarctic Laws, and which theories will hold up in International Law and how the issue of third party liability is dealt with in reality.

[39] Charney, J, 1996, *The Antarctic System and Customary International Law*, in Fancioni & Scovazzi, International Law for Antarctica, Kluwer Law International, The Netherlands.

[40] Dodds, Klaus, 2010, *Governing Antarctic: Contemporary Challenges and the Enduring Legacy of the 1959 Antarctic Treaty*, Global Policy, Vol 1, Issue 1, pages 108-115, Januray 2010

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